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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 Case No. : 2:16-cr-00046-GMN-PAL

9 **UNITED STATES OF AMERICA,**

10 **AMENDED MOTION TO INTERVENE**

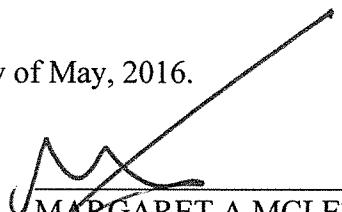
11 Plaintiff,

12 vs.

13 CLIVEN D. BUNDY, et al.,  
14 Defendants.

15  
16 The Las Vegas Review-Journal, Battle Born Media, and the Associated Press  
17 ("Proposed Intervenors") hereby move to intervene in this case. This motion is supported by  
18 the attached memorandum of points and authorities, together with any oral argument the  
19 Court may require in this matter.

20  
21 DATED this 3<sup>rd</sup> day of May, 2016.

22  
23   
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# MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

It is undisputed that this matter is of public interest. Given the pervasive media presence of some of the defendants in this matter, the case has been a fixture in local and national media since its inception. In fact, because several defendants have been active critics of the federal government for several years, the media has been following the progress of this matter even before the United States Attorney for the District of Nevada indicted the nineteen defendants. As described in the government's superseding indictment, this case has its roots in a decades-long dispute between defendant Cliven Bundy and the Bureau of Land Management ("BLM") over cattle grazing fees. (*See* Doc. #27 at pp.8:9-9:14.) On April 12, 2014, after the BLM and rangers with the National Park Service ("NPS") had begun impounding Mr. Bundy's cattle, Mr. Bundy and approximately several hundred individuals gathered in Bunkerville, Nevada to protest the impoundment of Mr. Bundy's cattle. (*Id.* at pp. 2:21-3:12.) This protest garnered extensive coverage by local and national media.

As detailed in Intervenors' attached Proposed Response (Exhibit A) to the government's proposed protective order, despite the importance of this the case and the public interests at stake, the government's protective order thwarts the public's right to information about this case by depriving it of access to all documents produced by the government. Moreover, in its hubris, the government has failed to provide any good cause to do so. Because the public has a vital interest in this case, and because the government has not met its burden, the proposed Intervenors now move to intervene so that they may oppose the government's proposed protective order.

## II. INTERESTS OF PROPOSED INTERVENORS

#### A. The Las Vegas Review Journal

The Review-Journal is a daily newspaper, published in Las Vegas, Nevada, and is the largest newspaper in Nevada. The Review-Journal carries on the constitutionally-protected business of reporting the news. It has standing to pursue this motion, designed to seek access to documents. Proposed intervenor Review-Journal began reporting on the

1 activities of Cliven Bundy before the April 12, 2014 protest.<sup>1</sup> Since the protest, the Review-  
 2 Journal has extensively covered the activities of Mr. Bundy and several of other defendants  
 3 in this matter.<sup>2</sup>

4 **B. Battle Born Media**

5 Battle Born Media publishes weekly newspapers in several rural communities in  
 6 Nevada focusing on rural Nevada issues such as water supplies, ranching, and free use of  
 7 public lands. Founded in 2011, Battle Born Media's publication include the Mesquite Local  
 8 News, the Ely Times, the Mineral County Independent News, the Lincoln County Record,  
 9 and the Eureka Sentinel. The Mesquite Local News is headquartered in Mesquite, Nevada, a  
 10 town near Defendant Cliven Bundy's Bunkerville ranch. Likewise, the Lincoln County  
 11 Record is headquartered in Pioche, about 150 miles north of Bunkerville. Both publications  
 12 have reported and will continue to report on several of the defendants in this case, which is  
 13 of vital interest to their readership.<sup>3</sup> Thus, the ability to provide readers information about  
 14 this case, including the government's investigation, is of great importance to Battle Born  
 15 Media.

16 **C. Associated Press**

17 The Associated Press ("AP") is a U.S.-based not-for-profit news organization  
 18 which operates as a cooperative reporting association in 106 countries. The AP is owned by  
 19 approximately 1,400 United States daily newspapers, and provides local, national and  
 20 international news stories through 15,000 media outlets. The AP has reported extensively on  
 21 the activities of the defendants in this case.<sup>4</sup>

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22 <sup>1</sup> See, e.g., <http://www.reviewjournal.com/news/nevada/bunkerville-rancher-vows-resist-federal-roundup-his-cattle> (last accessed April 26, 2016).

23 <sup>2</sup> See <http://www.reviewjournal.com/news/bundy-blm> (compiling the Review-Journal's  
 24 coverage of Mr. Bundy).

25 <sup>3</sup> See, e.g., <http://mesquitelocalnews.com/2015/06/cliven-bundy-says-he-met-gold-butte-surveyors-but-didnt-menace-them/>

26 <sup>4</sup> See, e.g., <http://www.cbsnews.com/news/nevada-rancher-cliven-bundy-the-citizens-of-america-got-my-cattle-back/>;

1           **III. ARGUMENT**

2           For the very reason that this case is a matter of public interest, the Proposed  
 3 Intervenors should be allowed to intervene for the purposes of voicing concerns regarding  
 4 limits to access to information. Under similar facts (although at a much later stage of the  
 5 case), Magistrate Judge Foley recently allowed the Las Vegas Review-Journal to intervene  
 6 and challenge stipulated protective orders. *United States v. Benzer*, 2015 WL 9200365, at \*7  
 7 (D. Nev. Dec. 15, 2015); *see also United States v. Benzer*, No. 2:13-CR-00018-JCM, 2015  
 8 WL 4724092, at \*4 (D. Nev. Aug. 7, 2015) (granting in part Intervenor Review-Journal's  
 9 motion to unseal).

10           Neither the Federal Rules of Criminal Procedure nor this Court's Local Rules  
 11 reference a motion to intervene in criminal cases. However, federal courts have recognized  
 12 that "because the First Amendment implicitly guarantees the right to access criminal trials,  
 13 motions to intervene are procedurally proper when the public or press seeks to intervene for  
 14 the limited purpose of accessing a criminal proceeding or court documents." *Stephens Media,*  
 15 *LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev. 849, 859, 221 P.3d  
 16 1240, 1247 (2009) (citing *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998); *United*  
 17 *States v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982); and *United States v. Criden*, 675  
 18 F.2d 550, 559 (3d Cir. 1982)); *see also United States v. James*, 663 F. Supp. 2d 1018, 1020  
 19 (W.D. Wash. 2009) ("Domestic press outlets unquestionably have standing to challenge  
 20 access to court documents.") (citation omitted).

21           The United States Supreme Court has held that where a court contemplates  
 22 excluding the press or the public from access to hearings or records in a criminal trial, "[...]  
 23 representatives of the press and general public 'must be given an opportunity to be heard on  
 24 the question of their exclusion.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596,  
 25 609, n. 25 (1982) (citing *Gannett Co. v. DePasquale*, 443 U.S., 368, 401 (Powell, J.,  
 26 concurring)). As Magistrate Judge Foley recently recognized, intervention should also be

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 http://bigstory.ap.org/article/fd516867e2bd4a5099d10cbc387fcf34/cliven-bundy-heads-back-court-seeking-release-jail.

1 permitted to allow the media to challenge protective orders. *See United States v. Benzer*, U.S.  
2 Dist. Ct. Case No. 2:13-cr-00018-JCM-GWF at Doc. #728 (minutes of August 5, 2015  
3 hearing (granting the Review-Journal's motion to intervene and hearing argument on motion  
4 to dissolve protective order).

5 Consistent with this case law, the Proposed Intervenors should be permitted to  
6 intervene in this matter.

7 **IV. CONCLUSION**

8 For the foregoing reasons, the Proposed Intervenors respectfully move to intervene  
9 in this matter, to be able to submit the attached Response to the Government's Protective  
10 Order.

11  
12 DATED this 3<sup>rd</sup> day of May, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3<sup>rd</sup> May, 2016, I did serve, via Case Management/Electronic Case Filing, a true and correct copy of the above and foregoing AMENDED MOTION TO INTERVENE addressed to the following:

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# EXHIBIT A

# EXHIBIT A

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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

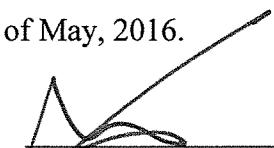
8 Case No. : 2:16-cr-00046-GMN-PAL

9  
10 **INTERVENORS' MEMORANDUM IN**  
11 **OPPOSITION TO THE GOVERNMENT'S**  
12 **PROPOSED PROTECTIVE ORDER**

13 UNITED STATES OF AMERICA,  
14 Plaintiff,  
15 vs.  
16 CLIVEN D. BUNDY, et al.,  
17 Defendants.

18 Intervenors Las Vegas Review-Journal, Battle Born Media, and the Associated  
19 Press hereby submit this motion in opposition to the government's proposed protective order.  
20 This motion is supported by Federal Rule of Criminal Procedure 16(d)(1), the attached  
memorandum of points and authorities, together with any oral argument the Court may  
21 require in this matter.

22 DATED this 3<sup>rd</sup> day of May, 2016.

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This case, and the underlying facts, are a matter of keen public interest and have been widely covered in local and national media. As described in the government’s superseding indictment, this case has its roots in a decades-long dispute between defendant Cliven Bundy and the Bureau of Land Management (“BLM”) over cattle grazing fees and the use of public lands. (See Doc. #27 at pp.8:9-9:14.) On April 12, 2014, after the BLM and rangers with the National Park Service (“NPS”) began impounding Mr. Bundy’s cattle, Mr. Bundy and approximately several hundred individuals gathered in Bunkerville, Nevada to protest the BLM’s actions. (*Id.* at pp.2:21-3:12.) These events garnered extensive coverage by local and national media. The Intervenors have extensively covered the activities of Mr. Bundy and several other defendants in this matter, as detailed in their Motion to Intervene.

Following its March, 2016 superseding indictment, on April 18, 2016, the government filed a proposed complex case schedule. (*See* Doc. #270.) There, the government indicated that, “[o]ut of concern for witness safety and security,” it intended to seek a protective order to prevent the dissemination of discovery in this matter. (*Id.* at p.16:12.) The government provided no specific facts or argument to support this request. In its subsequent proposed protective order, the government suggests that the protective order should apply to all “materials and documents created or written by the government, or obtained by the government through warrants or court order.” (Exhibit (“Exh.”) A (proposed protective order).) Again, the government fails to articulate good cause for the restrictions it proposes, contrary to Federal Rule of Criminal Procedure 16(d)(1), which requires the party moving for a protective order to establish good cause. *See, e.g., United States v. Benzer*, 2015 WL 9200365 at \*5 (D. Nev. 2015) (“The party seeking the protective order bears the burden of showing good cause.”) (citations omitted).

This overbroad and unsupported protective order impedes the rights of Intervenors and other news outlets to report on a case of local and national importance. One of the most critical aspects of news reporting is to inform the public of justice being carried out in the

1 courts. In this regard, the press is vital to the health of a democracy. *See, e.g., Nixon v. Warner*  
 2 *Communications, Inc.*, 435 U.S. 589, 597 (1978). This right is anchored in the value of  
 3 keeping “a watchful eye on the workings of public agencies,” and in publishing “information  
 4 concerning the operation of government.” *Id.* at 597-98. “In short, justice must not only be  
 5 done, it must be seen to be done.” *United States v. Rosen*, 487 F. Supp. 2d 703, 716 (E.D.  
 6 Va. 2007).

7 The media and the public do not have an absolute right to access discovery  
 8 materials, nor do they have the same right to access discovery materials as they do to access  
 9 court filings. Accordingly, some courts have held that protective orders are not subject to the  
 10 same scrutiny as other prior restraints. Nevertheless, courts must still consider the First  
 11 Amendment implications when evaluating whether good cause exists. *United States v. Smith*,  
 12 985 F. Supp. 2d 506, 523 (S.D.N.Y. 2013); *see also Benzer*, 2015 WL 9200365, at \*5 (citing  
 13 *Smith*) (“examining a protective order under the framework of Rule 16(d) does not eliminate  
 14 the First Amendment as a relevant concern, but instead confines the First Amendment  
 15 scrutiny to the framework of Rule 16(d)’s good cause requirement”).

16 Here, the government’s proposed protective order totally thwarts the public’s right  
 17 to information about this case by protecting virtually all documents produced by the  
 18 government from disclosure. It does not comport with either Rule 16(d) or the First  
 19 Amendment. Thus, Intervenors respectfully request this Court deny the government’s  
 20 request for its proposed blanket protective order. The public’s First Amendment right to  
 21 observe and understand the investigation in this case deserves greater respect than this  
 22 proposed protective order provides. Indeed, the proposed order is especially inappropriate in  
 23 this case, where defendants have also cited First Amendment implications with regard to the  
 24 underlying facts.

## 25 **II. RELEVANT FACTUAL AND PROCEDURAL HISTORY**

### 26 **A. Indictment**

27 On March 2, 2016, the United States Attorney for the District of Nevada filed a  
 28 superseding criminal indictment charging nineteen defendants with sixteen counts related to

1 the April 12, 2014 protest in Bunkerville. (*See* Doc. #27 (Superseding Criminal Indictment)).  
 2 On March 24, 2016, the Court entered an order directing the parties to meet and confer to  
 3 discuss whether this case should be deemed complex. (*See* Doc. #198.)

4 **B. The Government's Proposed Complex Case Schedule**

5 The Court granted the parties until April 18, 2016 in which to file a stipulated  
 6 proposed complex schedule; if the parties were unable to agree regarding a case schedule or  
 7 disagreed as to whether the case should be designated complex, the Court directed the parties  
 8 to submit a proposed scheduling order. (*See* Doc. # 198.) In its proposed complex case  
 9 schedule, the government argued the Court should deem this case complex because of the  
 10 volume of evidence and information to be disclosed, the number of defendants, the volume  
 11 of social media, the number and variety of recorded evidence obtained from approximately  
 12 100 law enforcement officers from several agencies involved in the events giving rise to the  
 13 indictment, and the number of recordings obtained from news media, filmmakers, and online  
 14 journalists. (Doc. #270 at pp. 3:15-4:22.) By its own estimate, the government has apparently  
 15 spent “hundreds of hours reviewing, analyzing and organizing” 1.4 terabytes of evidence.  
 16 (*Id.* at pp. 4:24-5:3.) Additionally, the government indicates it has obtained “hundreds of  
 17 thousands of pages” of documents and/or communications produced by Facebook pursuant  
 18 to a court-authorized search warrant, and also has “dozens of search warrant applications and  
 19 supporting affidavits.” (*Id.* at pp. 6:8-7:1.)

20 The government proposed producing discovery in three phases:

21 **Phase I**

22 • Search warrants, applications, and affidavits relating to the search and seizure of  
 23 documents, property, or things.  
 24 • Statements, documents, and objects (including audio or video recordings) the  
 25 government is required to disclose pursuant to Federal Rules of Criminal Procedure  
 26 16(a)(1)(A)-(B) and D.

27 **Phase II**

28 • Documents and objects the government is required to produce pursuant to Fed. R.

1 Crim. P. 16(a)(1)(E).

2 **Phase III**

3 • Police reports and indictments relating to the charges in the superseding indictment,  
 4 except for reports, memoranda, or other documents prepared by the government  
 5 relating to interviews of prospective witnesses.

6 (Doc. #270 at p.14:5-18.)

7 The government further asserted that that “concerns for witness safety and security”  
 8 warrant a protective order to prevent “the further disclosure or dissemination of evidence  
 9 produced in this case.” (*Id.* at p.16:12-15.) Aside from its vague statement about “witness  
 10 safety,” the government provided no examples of how any witnesses in this case would be  
 11 adversely affected by the free dissemination of the discovery in this case.

12 **C. The Government’s Proposed Protective Order**

13 On April 26, 2016, the Court entered an order designating this case complex. (*See*  
 14 Doc. #321.) The Court ordered the parties to meet and confer regarding whether they could  
 15 agree on a proposed form of stipulated protective order. (*Id.*) If the parties could not reach  
 16 consensus, the Court directed the parties to either file separate proposed protective orders, or  
 17 file memoranda opposing entry of a protective order. (*Id.*)

18 The government has circulated a proposed protective order to the defendants. (*See*  
 19 Exh. A.) As in its proposed complex case schedule, the government fails to articulate any  
 20 good cause necessitating a protective order. In its proposed protective order, the government  
 21 proposes that all “materials and documents created or written by the government, or obtained  
 22 by the government through warrants or court orders” will be designated “protected.” (Exh.  
 23 A at p.2:18-20.) The proposed protective order carves out a small exception for discovery  
 24 the defendants might obtain from open sources such as social media and news accounts. (*Id.*  
 25 at p.2:20-23.) Otherwise, it appears that everything else the government believes it created  
 26 or obtained should be subject to protection. This is the very definition of “overbroad.”

27 Importantly, the proposed protective order unduly narrows the universe of  
 28 individuals who will have access to discovery documents that are of vital public concern.

1 Under the government's proposal, only a defendant, defense counsel, defense counsel's  
 2 employees, and persons deemed necessary to aid defense counsel in investigating and  
 3 preparing a defendant case would have access to the documents. (Exh. A at p.2:5-10.)

4 **III. STANDING**

5 As detailed in the Motion to Intervene, the Review-Journal is a daily newspaper,  
 6 published in Las Vegas, Nevada, and is the largest newspaper in Nevada, and Battle Born  
 7 Media publishes several weekly newspapers in rural Nevada. Thus, the Intervenors carry on  
 8 the constitutionally-protected business of reporting the news. Intervenors have standing to  
 9 pursue this motion, designed to seek access to court documents.

10 “[B]ecause the First Amendment implicitly guarantees the right to access criminal  
 11 trials, motions to intervene are procedurally proper when the public or press seeks to  
 12 intervene for the limited purpose of accessing a criminal proceeding or court documents.”

13 *Stephens Media, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 125 Nev.  
 14 849, 859, 221 P.3d 1240, 1247 (2009) (citing *In re Associated Press*, 162 F.3d 503, 507 (7th  
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 17 1018, 1020 (W.D. Wash. 2009) (“Domestic press outlets unquestionably have standing to  
 18 challenge access to court documents.”) (citation omitted).

19 The United States Supreme Court has held that where a court contemplates  
 20 excluding the press or the public from access to hearings or records in a criminal trial, “[...]”  
 21 representatives of the press and general public ‘must be given an opportunity to be heard on  
 22 the question of their exclusion.’” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596,  
 23 609, n. 25 (1982) (citing *Gannett Co. v. DePasquale*, 443 U.S., 368, 401 (Powell, J.,  
 24 concurring)).

25 **IV. ARGUMENT**

26 When the government seeks to deprive the public of access in a criminal  
 27 prosecution through a protective order, Federal Rule of Criminal Procedure 16(d)(1) requires  
 28 the government to establish good cause and articulate with specificity the reasons such a



1 drastic measure is necessary. Before ordering a hearing or document be sealed, the court  
 2 faced with the motion must make specific findings outlining the need for protection of some  
 3 important right and the absence of any less restrictive means of protecting that right. In doing  
 4 so, the First Amendment rights of access by the press and the public must be considered.

5 In this case, the government has failed to articulate good cause for denying the  
 6 public access to information about this prosecution. Instead, it seeks to designate essentially  
 7 all of the discovery in this case as “protected,” and fails to provide even the most basic  
 8 procedural mechanisms for the defendants or the public to challenge its decisions about what  
 9 should and should not be withheld from the public.

10 **A. Legal Standard**

11 The public’s right to inspect certain criminal court records is protected by the First  
 12 Amendment. *See, e.g., Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501,  
 13 511-12 (1984) (transcripts of jury voir dire); *see also Associated Press v. Dist. Ct.*, 705 F.2d  
 14 1143, 1145 (9th Cir. 1983) (various pretrial documents); *In re N.Y. Times Co.*, 585 F. Supp.  
 15 2d 83, 89 (D.D.C., 2008) (finding First Amendment and common law right to search warrant  
 16 materials); *Oregonian Publ’g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir.1990)  
 17 (recognizing First Amendment right of access to plea agreements); *accord United States v.*  
 18 *Loughner*, 769 F. Supp. 2d 1188, 1191 (D. Ariz. 2011) (finding a qualified right of access to  
 19 warrant materials). “The first amendment right of access is, in part, founded on the societal  
 20 interests in public awareness of, and its understanding and confidence in, the judicial  
 21 system.” *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) (internal citation  
 22 omitted).

23 This right of access is also rooted in the common law. “[C]ourts of this country  
 24 recognize a general right to inspect and copy public records and documents, including  
 25 judicial records and documents.” *Nixon v. Warner Communications*, 435 U.S. 589, 597  
 26 (1978). The common law right of access is based on the need for courts to “have a measure  
 27 of accountability and for the public to have confidence in the administration of justice.”  
 28 *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995); *see also Stephens Media LLC*



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v. *Eighth Judicial District Court*, 125 Nev. 849, 860, 221 P.3d 1240, 1248 (Nev. 2009) (“Public access inherently promotes public scrutiny of the judicial process, which enhances both the fairness of criminal proceedings and the public confidence in the criminal justice system.”). “The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.” *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

Of note here, while the United States Supreme Court has not considered the question, courts have held the First Amendment dictates that the public has a presumed right to access search warrants. *See, e.g., In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573-75 (8th Cir. 1988). In *Office of Gunn*, the Eighth Circuit explained that “even though a search warrant is not part of the criminal trial itself, like voir dire, a search warrant is certainly an integral part of a criminal prosecution” and “[s]earch warrants are at the center of pre-trial suppression hearings, and suppression issues often determine the outcome of criminal prosecutions.” *Id.* at 573.

This presumed right can be overcome only by an overriding right or interest “based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* “The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” *Id.* Any order denying access to documents and proceedings in this case must satisfy both the procedural and substantive requirements of the First Amendment. *Oregonian Pub. Co. v. U.S. Dist. Court for Dist. of Oregon*, 920 F.2d 1462, 1466 (9th Cir. 1990). The Ninth Circuit has articulated a two-part test to determine whether the procedural requirements for depriving the public of access to criminal proceedings or documents has been met:

(1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and (2) the reasons supporting closure must be articulated in findings. *See Brooklier*, 685 F.2d at 1167-68; *In re Washington Post*, 807 F.2d at 390-91 (test applicable to sealed records of a plea hearing). An order of closure should include a discussion of the interests at stake, the applicable constitutional principles and the reasons for

rejecting alternatives, if any, to closure. *See Brooklier*, 685 F.2d at 1168.

*Id.*; see also *Phoenix Newspapers, Inc. v. U.S. Dist. Court for Dist. of Arizona*, 156 F.3d 940, 949 (9th Cir. 1998) (“. . . if a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives”).

The Supreme Court has held that criminal proceedings and court records may be closed to the public only if three requirements are met: (1) the closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest. *Press-Enterprise Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 13-14 (1986) (“*Press-Enterprise II*”); *accord Oregonian Publishing Co.*, 920 F.2d at 1466. Admittedly, the media and the public do not have an absolute right to access nor the same right to access discovery materials as they do to access court filings. However, at the very least, a court must consider the First Amendment implications when evaluating whether good cause exists for a proposed protective order. *United States v. Smith*, 985 F.Supp.2d 506, 523(S.D. N.Y. 2013); *see also Benzer*, 2015 WL2015 WL 9200365, at \*5 (citing *Smith*) (examining a protective order under the framework of Rule 16(d) does not eliminate the First Amendment as a relevant concern, but instead confines the First Amendment scrutiny to the framework of Rule 16(d)’s good cause requirement.”).<sup>1</sup>

Reflecting the presumption in favor of access, an order precluding the parties or other persons from disclosing discovery materials to the public, the press, or any other third party must be supported by good cause. *See Fed. R. Crim. P. 16(d)(1)*. The party seeking the

<sup>1</sup> Unlike here, the parties in *Benzer* entered into two stipulated protective orders. See *Benzer*, 2015 WL 9200365 at \*5. As the court noted, some courts have held that “[w]hile courts generally make a finding of good cause before issuing a protective order, the court need not do so where the parties stipulate to the order.” *Id.* (citing *In re Roman Catholic Archbishop of Portland Oregon*, 661 F.3d 417, 424 (9th Cir 2011)). Thus, the government in that case did not bear the same burden it does here of establishing good cause for the entry of a protective order.

1 protective order bears the burden of establishing that. *United States v. Smith*, 985 F. Supp.  
 2d 506, 512 (S.D. N.Y. 2013). As the court in *United States v. Loughner* explained, the party  
 3 seeking to prohibit access to discovery

4 must show that non-disclosure “is strictly and inescapably necessary” in  
 5 order to protect the Defendant’s fair trial guarantees or some other  
 6 compelling interest. [*United States v. J. Brooklier*, 685 F.2d [1162,] 1167  
 7 [(9th Cir. 1982)] (quoting *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368,  
 8 441, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979)). This is a high bar,  
 9 surmountable only by establishing a substantial probability that: (1)  
 10 disclosure will cause irreparable harm to the Defendant’s fair trial rights or  
 11 some other compelling interest; (2) there is no alternative to continued  
 12 secrecy that will adequately protect the right or interest; and (3) non-  
 13 disclosure will effectively protect against the perceived harm. *Oregonian  
 14 Publ’g Co.*, 920 F.2d at 1466. *See also United States v. Kaczynski*, 154 F.3d  
 15 930, 932 (9th Cir.1998) (overcoming qualified right of access under the  
 16 First Amendment requires compelling showing beyond that necessary to  
 17 overcome common law right of access) (Reinhardt, J., concurring).

18 *United States v. Loughner*, 769 F. Supp. 2d 1188, 1195 (D. Ariz. 2011); *cf. Foltz v. State*  
 19 *Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). To meet its burden, the  
 20 government must also demonstrate harms—with specificity.

21 “The party opposing disclosure has the burden of proving good cause, which  
 22 requires a showing that specific prejudice or harm will result if the protective order is not  
 23 granted.” *Foltz*, 331 F.35 at 1130. A party seeking a protective order must show “that  
 24 disclosure will result in a clearly defined, specific and serious injury.” *Smith*, 585 F. Supp.  
 25 2d at 523 (quoting *In re Terrorist Attacks on September 11, 2001*, 454 F.Supp.2d 220, 222  
 26 (S.D.N.Y.2006)) (other citation omitted); *cf. Deford v. Schmid Prods. Co.*, 120 F.R.D. 648,  
 27 653 (D. Md. 1987) (requiring party requesting a protective order to provide “specific  
 28 demonstrations of fact, supported where possible by affidavits and concrete examples, rather  
 than broad, conclusory allegations of potential harm”); *see also United States v. Carriles*,  
 654 F.Supp.2d 557, 565–66 (W.D. Tex. 2009) (“As the party seeking a protective order, the  
 Government bears the burden of showing good cause.”); *c.f. Gambale v. Deutsche Bank AG*,  
 377 F.3d 133, 142 (2d Cir.2004) (“The party seeking a protective order [under Fed.R.Civ.P.

1 26(c)] has the burden of showing that good cause exists for issuance of that order.”) (internal  
 2 quotation marks and brackets omitted). Finally, the government must demonstrate that the  
 3 need to protect against any specific potential harm outweighs the public’s right of access.  
 4 *See In re Roman Catholic Church*, 661 F.3d at 424 (quotation omitted). Since the government  
 5 has not specified any specific harm, it cannot meet this burden.

6                   **B. The Government Has Not Articulated Good Cause for the Issuance of**  
 7                   **a Protective Order.**

8                   In this case, the government has abjectly failed to comport with the requirements.  
 9 It has not met, and cannot meet, its burden of establishing good cause exists to subject  
 10 virtually all of the discovery in this case to a cloak of secrecy.

11                  **1. The Government Has Not Met Its Burden of Establishing That Phase I**  
 12                  **Discovery Merits Protection.**

13                  As discussed above, the documents the government has indicated the discovery  
 14 which would be produced in Phase I includes largely warrants and the responsive  
 15 documents—social media, including Facebook posts, messages, audio, and YouTube videos.

16                  These documents are critical to informing the public’s understanding of the  
 17 criminal investigation in this case. The government indicated in court on April 22, 2016 that  
 18 the warrants were being unsealed, so it is unclear why they would warrant protection.  
 19 Additionally, at least one state court has found a right of public access to search warrants  
 20 under its state constitution. *See Associated Press v. Montana*, 250 Mont. 299, 820 P.2d 421,  
 21 423 (1991) (right of public to inspect affidavits in support of warrants guaranteed by Article  
 22 II, section 9 of Montana constitution). And although most of the federal cases focus on access  
 23 issues during the investigatory or pre-indictment phase, one federal court of appeals has held  
 24 a qualified First Amendment right to inspect search warrants is triggered where, as here, the  
 25 warrants have already been executed. *See In re Search Warrant for Secretarial Area Outside*  
 26 *Office of Gunn*, 855 F.2d 569, 573 (8th Cir.1988); *accord Loughner*, 769 F. Supp. 2d at 1193.

27                  With regard to the responsive documents and audio/video recordings, since it  
 28 appears that they were primarily posted on Facebook and YouTube, the responsive

1 documents likely also largely consist of documents that are already public. Thus,  
 2 government's proposal to designate the materials it obtained from Facebook and YouTube  
 3 "protected" is flawed in two fundamental respects. Because the protective order is so vague  
 4 and overbroad, it is impossible to discern to what extent, if any, the discovery the government  
 5 obtained from Facebook and YouTube pursuant to search warrants differs from what was  
 6 already available to the public. Absent some demonstration that these items are different, and  
 7 that there is a specific, good cause reason for preventing the public from viewing these items,  
 8 the government cannot force them under the veil of a protective order.

9 Further, because these materials are likely already public, the cat has already been  
 10 let out of the bag, and the government cannot try to force it back in. *Cf. Gambale v. Deutsche*  
 11 *Bank AG*, 377 F.3d 133, 144 n. 11 (2d Cir.2004) ("Once the cat is out of the bag, the ball  
 12 game is over.") (quoting *Calabrian Co. v. Bangkok Bank, Ltd.*, 55 F.R.D. 82  
 13 (S.D.N.Y.1972)). To the extent the government believes that it can, in essence, retroactively  
 14 protect publicly available information, it cannot do so absent a demonstration that—*at a*  
 15 *minimum*—good cause exists to justify the retroactive designation. *Cf. Rambus, Inc. v.*  
 16 *Infineon Technologies AG*, 2005 WL 1081337, at \*3 (E.D. Va. 2005) (finding court's use of  
 17 documents in open court while deciding a dispositive motion subjects the documents to the  
 18 First Amendment right of access and effectively strips them of any protection under the  
 19 protective order).<sup>2</sup>

20 The government also indicated at the April 22 hearing that it obtained Facebook  
 21 Messenger communications pursuant to a search warrant issued to Facebook. Although  
 22 Facebook Messenger communications are generally not publicly accessible, the government  
 23 still has not articulated a good cause reason as to why each individual communication must

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25 <sup>2</sup> The government has also filed memoranda with the Court that include photographs and  
 26 video images, many of which were likely produced in the course of the government's  
 27 investigations. (See Docs. #110, 127, 128, 130, 133, and 281.) These public disclosures  
 28 weigh heavily against the government's argument for a protective order. *See Pfizer, Inc. v.*  
*Teva Pharmaceuticals USA, Inc.*, 2010 WL 2710566 at \*4 (D. N.J. 2010) (matters already  
 made public "will not be sealed after the fact absent extraordinary circumstances").

1 be subjected to the blanket protection order. Further, the government has failed to address  
 2 whether redaction of identifying information would reasonably protect the interest of  
 3 prospective witnesses.

4 **2. The Government Has Not Met Its Burden of Establishing That Phase**  
 5 **II Discovery Merits Protection.**

6 Phase II is essentially a catch-all category—“[d]ocuments and objects the  
 7 government is required to produce pursuant to Fed. R. Crim. P. 16(a)(1)(E).<sup>3</sup>” (Doc. #270 at  
 8 p.14:12-13.) As such, the government has not met its burden of showing that all the  
 9 documents that fall within this category merit protection. As detailed above, specificity is  
 10 required. *See, e.g., Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987)  
 11 (requiring party requesting a protective order to provide “specific demonstrations of fact,  
 12 supported where possible by affidavits and concrete examples, rather than broad, conclusory  
 13 allegations of potential harm”).

14 **3. The Government Has Not Met Its Burden of Establishing That Phase**  
 15 **III Discovery Merits Protection.**

16 The government’s proposed Phase III of discovery would include disclosure of  
 17 police reports and indictments related to interviews of prospective witnesses. (Doc. #270 at  
 18 p.14:16-18.) Again, the government has failed to articulate any sufficient basis for the broad  
 19 protection it is seeking. The government has offered no specific assertion that any witnesses  
 20 would be harmed by permitting the public access to these materials. Instead, it makes the  
 21 generalized assertion that the protective order is necessary because of its concerns for  
 22 “witness safety and security.” (Doc. #270 at p.16:12.) This does not satisfy the government’s  
 23 burden of establishing good cause. *See Deford v. Schmid Prods. Co.*, 120 F.R.D. at 653.

24 Although ensuring witness safety is undoubtedly a compelling government interest,

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 26 <sup>3</sup> Fed. R. Crim. P. 16(a)(1)(E) mandates that “upon a defendant’s request, the government  
 27 must permit a defendant to inspect and to copy or photograph books, papers, documents,  
 28 data, photographs, tangible objects, buildings or places, or copies or portions of any of these  
 items, if the item is within the government’s possession, custody, or control and: (i) the item  
 is material to preparing the defense; (ii) the government intends to use the item in its case-in-  
 chief at trial; or (iii) the item was obtained from or belongs to the defendant.”

1 the government has failed to provide any proof that, absent the entry of a protective order,  
2 any particular witness or witnesses' safety would be endangered. Perhaps most critically, the  
3 government has failed to consider alternatives—such as redacting personal identifying  
4 information—which would ensure witness safety without infringing on the public's First  
5 Amendment rights.

6 **C. The Protective Order Lacks Appropriate Safeguards.**

7 The government's proposed protective order does not contain any procedural  
8 mechanisms whatsoever to ensure that materials that should not be protected are not. Instead,  
9 as discussed above, it entirely prohibits disclosure of every single document produced by the  
10 government to defendants, their counsel, and persons working for their counsel. Including  
11 procedural mechanisms to allow for protection where needed, to provide access where  
12 appropriate, and to ensure the public and the media know categories of information are  
13 hidden from public view would further the purposes of Rule 16. Additionally, the proposed  
14 protective order lacks many aspects that would protect the due process rights of the  
15 defendants and the public's right of access, such as procedural guidelines for designating  
16 documents confidential.

17 **1. The Protective Order Should Require Redaction Where Feasible.**

18 As noted above, any alleged risk to any individual prospective witness could be  
19 easily eliminated through redaction of identifying information such as names, Social Security  
20 numbers, location, and other identifying information.

21 Additionally, the protective order should provide defendants the ability to disclose  
22 the contents of documents the government has designated protected. The court in *Benzer*, in  
23 denying intervenor Review-Journal's motion to dissolve the two stipulated protective orders  
24 the parties entered into in that case, noted that the first of the two protective orders "not  
25 preclude Defendants or their counsel from disclosing the contents of the Protected  
26 Documents subject to that order, other than the personal identifying information contained  
27 in those documents." *United States v. Benzer*, 2015 WL 9200365 at \*7. The court also  
28 provided the parties with the appropriate procedure to follow if any of the defendant chose

1 to release documents covered by the protective order:

2        Prior to disclosing or disseminating any Protected Documents covered by  
 3        Stipulated Protective Order . . . , however, Defendants or their counsel shall  
 4        notify the Government and provide it with copies of the proposed redactions  
 5        to ensure that the documents have been properly redacted. In the event that  
 6        the Government objects to production on the grounds that the redactions are  
 7        not sufficient, the parties may move the Court for an order authorizing or  
 8        prohibiting the disclosure of the documents as redacted.

9        *Id.* Such a procedure would also be appropriate in this case.

10        **2. The Government Should Maintain a Log.**

11        A log should be created—and publicly filed—indicating what is being protected  
 12        and why. The government has indicated that it is preparing an index of all the materials it is  
 13        producing in this case, so any burden created by also requiring the government to maintain a  
 14        log of protected documents and items would be minimal.

15        **3. There Should Be Meaningful Mechanisms to Challenge  
 16        Confidentiality.**

17        While the proposed protective order includes a brief statement that a defendant who  
 18        wishes to challenge the government’s designation of “protected” discovery must confer with  
 19        the government “before seeking guidance from this Court,” the protective order contains no  
 20        meaningful mechanism for anyone (including the media) to challenge the government’s  
 21        designation of documents as “protected.” Indeed, it improperly shifts the burden away from  
 22        itself.

23        Any protective order should include a provision dictating the process by which a  
 24        defendant can challenge the government’s designation of “protected” documents. Such a  
 25        procedure would, at a minimum include:

26        • **Notice and Opportunity to Challenge:** A party who contends that discovery the  
 27        government has designated “protected” should have the ability to give the  
 28        government written notice of the specific bases for challenging the government’s  
 29        designation. The government would then have some reasonable period of time—for  
 30        example, ten days—to determine if the dispute can be resolved without this Court’s

1 intervention, If not, the government should then be required to move the Court for an  
 2 order confirming its “protected” designation.

3 • **A Provision Protecting Against Waiver:** The protective order should also protect  
 4 parties against waiving any challenges to the government’s designations. To that end,  
 5 the protective order should include a provision that challenges to the government’s  
 6 “protected” designations can be made at any time, and cannot be waived by the failure  
 7 of a party to raise the challenge at the time of the government’s initial disclosure or  
 8 designation.

9 **4. The Existence of the Protective Order Should Not Mandate Sealing.**

10 Stating that a defendant who wishes to challenge the government’s designation of  
 11 “protected” discovery must confer with the government “before seeking guidance from this  
 12 Court” suggests that the party challenging confidentiality bears the burden. (Exh. A at pp.  
 13 2:24-3:2.) As noted above, this is not the case and, while less scrutiny may apply to discovery  
 14 materials, the government bears a significant burden in establishing that documents should  
 15 be filed under seal.

16 As the party who designated the discovery “protected,” the government has the  
 17 burden of making a particularized showing of good cause or compelling reasons to allow any  
 18 documents it designated “protected” to remain protected. *See Beckman Indus., Inc. v. Int’l*  
*19 Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992) (“. . . the party opposing modification should  
 20 have the burden of showing “good cause” for continued protection”). The Protective Order  
 21 should specify this burden to avoid conflating the standard for discovery materials with this  
 22 standard.

23 **V. CONCLUSION**

24 Especially in light of the nature of this case, and the public’s longstanding interest  
 25 in the individuals and ideas that have played out for over two years on the local and national  
 26 stage, the overbroad protective order proposed by the government cannot be entered and, if  
 27 an alternative is entered after good cause is demonstrated, this Court should enter a protective  
 28 order that respects the public’s right to learn about this case and observe the workings of

1 justice. As the Ninth Circuit cautioned in *San Jose Mercury News Inc.*, blanket protective  
2 orders such as the one the government proposes are “are inherently subject to challenge and  
3 modification, as the party resisting disclosure generally has not made a particularized  
4 showing of good cause with respect to any individual document.” *San Jose Mercury News*  
5 *Inc.*, 187 F.3d at 1103. The government has not made this showing.

6 DATED this 3<sup>rd</sup> day of May, 2016.

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8  
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# EXHIBIT A

# EXHIBIT A

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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**

9 UNITED STATES OF AMERICA, )  
10 Plaintiff, ) 2:16-CR-00046-GMN-PAL  
11 v. ) PROPOSED PROTECTIVE ORDER  
12 CLIVEN D. BUNDY, )  
13 RYAN C. BUNDY, )  
14 AMMON E. BUNDY, )  
15 RYAN W. PAYNE, )  
16 PETER T. SANTILLI, )  
17 MEL D. BUNDY, )  
18 DAVID H. BUNDY, )  
19 BRIAN D. CAVALIER, )  
20 BLAINE COOPER, )  
21 GERALD A. DELEMUS, )  
22 ERIC J. PARKER, )  
O. SCOTT DREXLER, )  
RICKY R. LOVELIEN, )  
STEVEN A. STEWART, )  
TODD C. ENGEL, )  
GREGORY P. BURLESON, )  
JOSEPH D. O'SHAUGHNESSY, )  
MICAH L. McGUIRE, and )  
JASON D. WOODS, )  
23 Defendants. )  
24

1       Upon motion of the United States, the Court being advised as to the nature  
2 of this case, and good cause being shown, it is hereby ORDERED that, pursuant to  
3 Rule 16(d)(1) of the Federal Rules of Criminal Procedure, defense counsel may  
4 provide copies of discovery only to the following individuals:

5       (1) The defendants in this case;

6       (2) Persons employed by the attorney of record who are necessary to assist  
7       counsel of record in preparation for trial or other proceedings in this case;  
8       and

9       (3) Persons who defense counsel deems necessary to further legitimate  
10      investigation and preparation of this case.

11      IT IS FURTHER ORDERED that defense counsel shall provide a copy of  
12      this Protective Order to any person above who receives copies of discovery.

13      IT IS FURTHER ORDERED that any person above who receives copies of  
14      discovery from defense counsel shall use the discovery only to assist the defense in  
15      the investigation and preparation of this case, and shall not reproduce or  
16      disseminate the discovery material to any other person or entity.

17      IT IS FURTHER ORDERED that this Protective Order applies only to  
18      materials and documents created or written by the government, or obtained by the  
19      government through warrants or court orders. This Protective Order does not  
20      restrict reproduction or dissemination of discovery materials the defense may  
21      otherwise obtain through open sources (e.g., social media posts by the defendants  
22      or others, news accounts related to the events in this case, etc.).

24      IT IS FURTHER ORDERED that if there is specific discovery material that

1 defense counsel believes should be an exception to this Protective Order, the  
2 parties shall confer before seeking guidance from this Court. The parties shall  
3 advise the Court by letter of any exceptions made to the Protective Order.

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